**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **VICTORIA THOMAS** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **PIT STOP LIQUOR** | ) | |
| Respondent | ) | Docket No. 1,050,591 |
| | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

# ORDER

## STATEMENT OF THE CASE

The Kansas Workers Compensation Fund (Fund) and respondent requested review of the September 10, 2010, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Patrick C. Smith, of Pittsburg, Kansas, appeared for claimant. Timothy J. Grillot, of Parsons, Kansas, appeared for respondent. William L. Phalen, of Pittsburg, Kansas, appeared for the Fund.

The Administrative Law Judge (ALJ) designated Dr. Kevin Mosier to be claimant's authorized treating physician. The ALJ found that respondent was insolvent and ordered the Fund to pay Dr. Mosier's bills as authorized medical expenses.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 18, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent requests review of whether claimant provided respondent with timely notice of her accident.

The Fund asks that the Board find claimant did not prove she sustained accidental injury that arose out of and in the course of her employment with respondent. The Fund further contends claimant failed to give respondent proper notice of her alleged accident or accidents. Last, the Fund asserts neither claimant nor respondent proved that respondent is insolvent.

Claimant argues that her injury arose out of and in the course of her employment, that she gave timely notice, and that her written claim was timely.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury or injuries that arose out of and in the course of her employment with respondent?

(2) Did claimant give respondent timely notice of her accident or accidents?

(3) Was claimant's written claim timely?

(4) Is respondent insolvent so as to make the Fund responsible for any benefits ordered paid?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant had worked for respondent, a liquor store, for about 9 or 10 years. Her general duties included stocking liquor and cases of beer. She would also work the drive-up window, which would require her to hand purchases, including 30-packs of beer, out the window to the customers. When she was not busy performing those duties, she would sweep, clean and run the cash register. She usually worked six days a week. She said the job included some lifting above her head, but more pulling stock down from over her head. She would pull product down maybe 20 times a day, more on weekends because the store was busier.

Claimant testified that she could not remember when she started experiencing pain in her right shoulder, but about three years ago she began having noticeable pain. She did not have health insurance, so she did not seek medical treatment until the pain became intolerable. She saw Dr. Jimmy Buller on September 21, 2007, for her right shoulder pain. She also had some left shoulder pain, but it was less than on the right. She also had pain in her neck. Her right shoulder pain feels like knives jabbing into her shoulder, in the joints and muscle. The pain goes down her shoulder into her right hand. Claimant attributes her shoulder pain to working at the liquor store. When she worked, the pain would become worse. In the last year to 18 months, the pain has become constant. Dr. Buller has prescribed medication for the pain.

Claimant said that she and respondent's owner, Roland Sailsbury, talked about her shoulder pain. When she had pain, she would let him know she was hurting. At one point, he let her go to a medical supply business and get an immobilizer for her shoulder to help ease her pain. Claimant also said that Mr. Sailsbury had a man come in to do some heavy lifting for her. She said Mr. Sailsbury called this man her "shoulder replacement."

Mr. Sailsbury testified that claimant complained of pain every day, but she did not tell him the cause of the pain, nor did she ever attribute her shoulder pain to her work at the store. He knew that claimant at times wore a brace for her shoulder, but he could not remember when she first started wearing it. Mr. Sailsbury said that when claimant first started working for him, she told him she had injured her shoulder while working for KP&L when she was ramming rods to clean a boiler. He said the first time he was aware that claimant was contending she hurt her shoulder at his store was the day he received notice that she had filed a workers compensation claim.[1]

Mr. Sailsbury admitted that he hires part-time workers to help on weekends. But he said he did not know what claimant was talking about when she testified that he called someone her "shoulder replacement."

Claimant's last day of employment was on February 17, 2010. On that day, Katrina Fausset, Mr. Sailsbury's girlfriend, came into the liquor store. Ms. Fausset testified that while she and claimant were talking, claimant became angry when told Ms. Fausset was more than friends with Mr. Sailsbury. Claimant picked up a stool with both hands and tossed it, hitting some of the liquor bottles. Ms. Fausset said claimant then picked up the business phone with her right hand and threw it about 8 to 9 feet into the glass cooler door. She said that claimant then threw her personal phone the same distance but used her left hand. Claimant then left the store. Mr. Sailsbury said that he was at home on February 17, 2010, when claimant stormed in "throwing a fit."[2] He said that claimant threatened to get back at him because he was in a romantic relationship with Ms. Fausset.

Mr. Sailsbury testified that when he first opened his business in 2000, he had workers compensation insurance, and he was under the impression he had it since that time. However, after he received claimant's claim for benefits, he was informed that his workers compensation insurance was not renewed after 2004. In regard to his financial ability to pay this claim, Mr. Sailsbury said that it would depend upon how large the claim ended up. He testified that he made a profit in 2009, but he did not know how much profit. He draws a salary of $25,000. His house is paid for, but he is making payments on his car.

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[1] Mr. Sailsbury does not say when he received notice of the workers compensation claim, but the Division records show that a Form K-WC E-1 Application for Hearing was filed on April 30, 2010.

[2] P.H. Trans. at 27.

He has a second business, a storage building business, for which he is still making payments.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[3] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

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[3] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

**Did claimant sustain an accidental injury or injuries that arose out of and in the course of her employment with respondent?**

The ALJ did not make a specific finding that claimant's shoulder condition was caused by her work with respondent but such a finding is implicit within his order designating Dr. Mosier to be claimant's authorized treating physician. Whether claimant sustained personal injury by an accident or accidents that arose out of and in the course of her employment with respondent is an issue which K.S.A. 44-534a(a)(2) gives the Board jurisdiction to review on an appeal from a preliminary hearing order.

Claimant never specifically told her employer that her shoulder injury was related to her work with respondent or that her job was making her injury worse. Claimant argues that her employer, Mr. Sailsbury, knew this because she complained to him about her

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[4] K.S.A. 2009 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

shoulder hurting and because she started wearing a brace at work. In addition, respondent accommodated her by having co-workers help with the lifting. Mr. Sailsbury admits that claimant complained about her shoulder but said she never attributed her shoulder problem to her job with respondent. He further denied that he ever hired anyone specifically to accommodate her injury. It does not appear that claimant ever asked respondent to provide her with a doctor or for workers compensation benefits while she was still employed by respondent.

There is no expert medical opinion relating claimant's shoulder condition to her work with respondent. However, expert testimony is not required.[7] The onset of claimant's shoulder complaints is not clear. What is clear is that her symptoms worsened to the point where she sought medical treatment and started using a brace at work. Furthermore, the type of work claimant described seems consistent with her alleged injury. This Board Member is persuaded that claimant, at a minimum, aggravated a preexisting shoulder condition as a result of performing her regular job duties with respondent. As such, claimant has met her burden of proving she suffered personal injury by a series of accidents arising out of and in the course of her employment with respondent.

**Did claimant give respondent timely notice of her accident or accidents?**

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

This claim is before the Board on an appeal from a preliminary hearing order. Claimant's date of accident is not an issue that the Board has jurisdiction to review on an

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[7] *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

appeal from a preliminary hearing order except as may be necessary to determine a jurisdictional issue such as whether notice of accident was timely given. In this case, the ALJ did not make a specific finding concerning the date of accident. Nevertheless, this Board Member cannot determine the timeliness of claimant's notice and written claim without first determining a date of accident for the series.

K.S.A. 2009 Supp. 44-508(d) is the statute that must be applied to the facts in this case in determining claimant's date of accident.

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act. [8]

Here, claimant neither had an authorized physician nor was she taken off work or given restrictions due to her shoulder condition. She did not receive any written notice that her condition was work related. Therefore, her date of accident is the date she gave written notice to the employer. The first written notice she gave to her employer was the Application for Hearing filed with the Division on April 30, 2010. The Kansas Court of Appeals has held that per the provisions of K.S.A. 2009 Supp. 44-508(d), the date of accident for a series can be after the last day a claimant actually worked.[9] Based upon an accident date of April 30, 2010, notice was timely.

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[8] K.S.A. 44-510(d).

[9] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 1048, 207 P.3d 275 (2009), *rev. pending*.

**Was claimant's written claim timely?**

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Based upon the date of accident found above, written claim was timely.

**Is respondent insolvent so as to make the Fund responsible for any benefits ordered paid?**

K.S.A. 44-532a(a) states:

> If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

Whether or not respondent is financially able to pay compensation to claimant is not an issue the Board has jurisdiction to address on an appeal from a preliminary hearing order.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 10, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Timothy J. Grillot, Attorney for Respondent
William L. Phalen, Attorney for Kansas Workers Compensation Fund
Thomas Klein, Administrative Law Judge

[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2009 Supp. 44-555c(k).